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Filing date: **01/22/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91185261
Party	Defendant N.V. Sumatra Tobacco Trading Company
Correspondence Address	TARA M VOLD FULBRIGHT & JAWORSKI LLP 801 PENNSYLVANIA AVENUE NW WASHINGTON, DC 20004 UNITED STATES tvold@fulbright.com, wotrademark@fulbright.com
Submission	Other Motions/Papers
Filer's Name	Tara M. Vold
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Signature	/tmv/
Date	01/22/2013
Attachments	Opp. No. 91185261 Motion And Memorandum Of Law In Support Of Applicant's Motion For Summary Judgment.pdf (19 pages)(489738 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

American Cigarette Company, Inc. and
Smokers Best LLC

Opposers,

v.

Opp. No. 91185261
(Consolidated)

N.V. Sumatra Tobacco Trading Co.

Applicant.

**MOTION AND MEMORANDUM OF LAW IN SUPPORT OF
APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Applicant N.V. Sumatra Tobacco Trading Co. ("Applicant" or "N.V. Sumatra") respectfully moves for summary judgment on the oppositions lodged in the name of American Cigarette Company Inc. ("ACC") and Smoker's Best, LLC ("Smoker's Best") (collectively "Opposers") to the registration of N.V. Sumatra's applications for UNION GOLD (App. No. 76/415,303) and UNION and Design (App. No. 76/415,305) (the "Applications"), and respectfully submits this memorandum of law in support thereof.

BACKGROUND

ACC filed oppositions to the registration of N.V. Sumatra's Applications for UNION GOLD (App. No. 76/415,303) (Opp. No. 91185261) and UNION and Design (App. No. 76/415,305) (Opp. No. 91186841) on July 17, 2008 and October 7, 2008, respectfully (the "Oppositions"). The Oppositions, which were consolidated on November 4, 2008 (Consolidated Opp No. 91185261), were based on a likelihood of confusion with the UNION mark which is the subject of now cancelled Registration No. 2,972,524.

N.V. Sumatra filed a Petition to Cancel Reg. No. 2,972,524 on June 24, 2010 (Canc. No. 92052621) (the “Cancellation”) based on ACC’s lack of bona fide use of the UNION mark in the ordinary course of business prior to the statutorily mandated February 19, 2005 Statement of Use deadline. The Oppositions and Cancellation were further consolidated by the Board on August 12, 2010 (Consolidated Proceeding No. Opp No. 91185261).

Effective July 21, 2011, the UNION registration upon which the Oppositions were based (Reg. No. 2,972,524) was assigned to Smoker’s Best Group, LLC (“Smoker’s Best”). The assignment document was recorded with the USPTO on November 23, 2011. (Reel/Frame 3542/0087). No notification, motion to join or appearance has ever been filed on behalf of ACC and/or Smoker’s Best with the Trademark Trial and Appeal Board as a result of this assignment.

N.V. Sumatra filed a Motion for Summary Judgment on the Cancellation on December 1, 2011. No response to the Motion for Summary Judgment was filed on behalf of ACC and/or Smoker’s Best Group despite the Board’s service of the Motion on both ACC and Smoker’s Best. In an Order dated January 17, 2013, the Board granted N.V. Sumatra’s Motion for Summary Judgment as conceded and ordered that the Registration No. 2,972,524 be cancelled in due course. The Board further resumed proceedings in the Oppositions.

N.V. Sumatra respectfully moves this Board to deny the Oppositions, based on the failure of ACC and/or Smoker’s Best to establish the necessary priority required under the Section 2(d) claim upon which the Oppositions rest, and to instruct that N.V. Sumatra’s Applications for UNION GOLD (App. No. 76/415,303) and UNION and Design (App. No. 76/415,305) be allowed.

STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, shows there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To prevail on the

motion, the moving party must show “an absence of evidence to support the non-moving party’s case” considering the pleadings, depositions, answers to interrogatories, admissions, and affidavits. *Celotex* at 326. Thus, N.V. Sumatra, as the moving party, bears the initial burden to “point out . . . that there is an absence of evidence supporting the nonmoving party’s case.” *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563, 4 U.S.P.Q.2d 1793 (Fed. Cir. 1987); *see also Kellogg Co. v. Pack’Em Enters. Inc.*, 951 F.2d 330, 333, 21 U.S.P.Q.2d 1142, 1145 (Fed. Cir. 1991). Once shown, the burden then shifts to the nonmoving party, ACC, to “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

ARGUMENT

ACC based the Oppositions solely on the likelihood of confusion of the parties’ respective marks under Section 2(d) of the Trademark Act. To prevail on a likelihood of confusion claim under Section 2(d), the opposer must establish that it has standing to maintain this proceeding; that it has priority; and that contemporaneous use of the parties’ respective marks on their respective goods would be likely to cause confusion, mistake or to deceive consumers. *See* 15 U.S.C. § 1052(d). For the reasons stated below, ACC and Smoker’s Best have conceded that they do not have the priority necessary to prevail in the Oppositions.

ACC based the priority claim in the Notices of Opposition solely on Reg. No. 2,972,524. *See* Notices of Opposition ¶¶6, 8 attached as Exhibit A. As Reg. No. 2,972,524 has now been cancelled pursuant to the Board’s January 17, 2013 order, ACC and Smoker’s Best can no longer rely on the June 1, 2001 filing date associated with that registration for priority.

Furthermore, discovery has not produced any other basis for a priority claim which would predate the June 7, 2002 filing date of the N.V. Sumatra Applications. In fact, ACC and Smoker’s Best conceded a lack of priority in failing to contest the Undisputed Facts set forth in N.V. Sumatra’s now granted

Motion for Summary Judgment for cancellation of Reg. No. 2,972,524. The following Undisputed Facts are reproduced for the Board's convenience.

- [Mary Jane Cigarette Co., Inc. ("MJC") (Opposers' predecessor)] filed an application with the United States Patent and Trademark Office on June 1, 2001 for registration of the mark UNION for cigarettes (App. No. 78/066,805). MJC's UNION application was based on a bona fide intention to use the mark in commerce. *Petitioner's Statement of Undisputed Facts*, ¶5.
- Petitioner filed applications for UNION GOLD (App. No. 76/415,303) and UNION and Design (App. No. 76/415,305) on June 7, 2002 both for "cigarettes, kretek cigarettes, cigars, Virginia tobacco, shag tobacco, cut of cloves for smoking, cigarettes papers, cigarette lighters not of precious metal and matches." *Petitioner's Statement of Undisputed Facts*, ¶6.
- MJC filed the SOU in connection with Registration No. 2,972,524 (then App. No. 78/066,805) for UNION on February 7, 2005 (as previously defined "the SOU" or "Respondent's SOU"). *Petitioner's Statement of Undisputed Facts*, ¶6; Exhibit 8
- In the SOU, MJC attested that "the mark was first used by the applicant, or the applicant's related company, licensee, or predecessor in interest at least as early as 02/04/2005, and first used in commerce at least as early as 02/04/2005, and is now in use in such commerce." *Petitioner's Statement of Undisputed Facts*, ¶6; Exhibit 8
- The only cigarettes that Respondent identified during discovery as having been manufactured in connection with the UNION brand prior to February 7, 2005 were "few hundred cartons of UNION branded cigarettes" produced by Falcon of America LLC in the end of 2004. *Petitioner's Statement of Undisputed Facts*, ¶13; Ex. 10.

- Respondent admits it made no shipments or sales of cigarettes under the UNION mark in commerce prior to February 3, 2005. *Petitioner's Statement of Undisputed Facts*, ¶20.

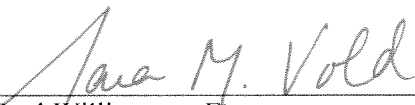
Therefore, by their own admissions, Opposers do not have priority and summary judgment in the Opposition in favor of N.V. Sumatra is appropriate.

CONCLUSION

WHEREFORE, N.V. Sumatra respectfully requests that the Board grant this Motion for Summary Judgment denying the Oppositions and instructing that N.V. Sumatra's Applications for UNION GOLD (App. No. 76/415,303) and UNION and Design (App. No. 76/415,305) be allowed.

Dated: January 22, 2013

Respectfully submitted,



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Attorneys for Applicant

N.V. Sumatra Trading Company Inc.

CERTIFICATE OF CONFERENCE

An attempt was made to contact Paul Nunes, counsel of record for Smoker's Best, LLC for now cancelled Reg. No. 2,972,524, via telephone on Friday, January 18, 2013 to inquire whether American Cigarette Company or Smoker's Best LLC would be withdrawing the oppositions in light of the Board's January 17, 2013 order cancelling Reg. No. 2,972,524. Applicant's counsel has received no response to that voicemail as of the date of this filing.



Tara M. Vold, Esq.
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION AND MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT was served via first class mail on this 22nd day of January 2013 upon the following:

Smoker's Best Group, LLC 645 Westmoreland Drive Tupelo, MS38801	American Cigarette Company, Inc. 1291-B NW 651 Place Fort Lauderdale, FL 33309
Paul V. Nunes, Esq. 300 Bausch & Lomb Place Rochester, Ny 14604 Attorney for Smoker's Best Group, LLC	

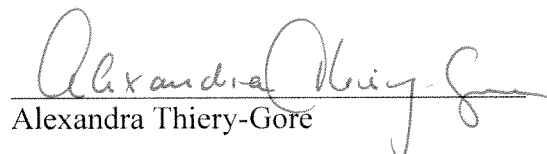

Alexandra Thiery-Gore

Exhibit A

91186841

Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA241110**Filing date: **10/07/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	American Cigarette Company, Inc.		
Entity	Corporation	Citizenship	Florida
Address	1291-B Northwest 65th Place Fort Lauderdale, FL 33309 UNITED STATES		

Attorney information	Robert C. Kain, Jr. Kain & Associates, Attorneys at Law, P.A. 750 Southeast Third Avenue Suite 100 Fort Lauderdale, FL 33316 UNITED STATES rkain@complexip.com, dspielman@complexip.com, ekotler@complexip.com
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Applicant Information

Application No	76415305	Publication date	09/09/2008
Opposition Filing Date	10/07/2008	Opposition Period Ends	10/09/2008
International Registration No.	NONE	International Registration Date	NONE
Applicant	N.V. SUMATRA TOBACCO TRADING COMPANY Jalan Pattimura No. 3 Pematang Siantar Sumatera Utara, INDONESIA		

Goods/Services Affected by Opposition

Class 034. All goods and services in the class are opposed, namely: CIGARETTES, KRETEK CIGARETTES, WHITE CIGARETTES, CIGARETTE FILTERS, CIGARS, TOBACCO, RAW TOBACCO, VIRGINIA TOBACCO, CIGARETTE TOBACCO, SNUFF TOBACCO, CHEWING TOBACCO, CUT OF CLOVES FOR SMOKING, CORNHUSK TOBACCO AND SMOKERS' ARTICLES, NAMELY, CIGARETTE PIPES, CIGARETTE PAPERS, TOBACCO POUCHES, PIPES, ASHTRAYS NOT OF PRECIOUS METAL, MATCHES, CIGARETTE LIGHTERS NOT OF PRECIOUS METAL, CIGARETTE CASES AND HOLDERS NOT OF PRECIOUS METAL AND MATCH BOXES AND HOLDERS NOT OF PRECIOUS METAL
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	2972594	Application Date	06/01/2001
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Registration Date	07/19/2005	Foreign Priority Date	NONE
Word Mark	UNION		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2004/02/04 First Use In Commerce: 2004/02/04 cigarettes		

Related Proceedings	Opposition No. 91185261
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Attachments	plead-Not-Opposition-100708.pdf (4 pages)(15448 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/rck/
Name	Robert C. Kain, Jr.
Date	10/07/2008

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 76/415,305
Published for opposition in the Official Gazette of August 20, 2008
Mark: U UNION and Design

-----)	
AMERICAN CIGARETTE)	
COMPANY INC.,)	
Opposer,)	
)	
v.)	Opposition No. _____
)	
N.V. SUMATRA TOBACCO)	
TRADING COMPANY)	
Applicant.)	
-----)	

NOTICE OF OPPOSITION

American Cigarette Company, Inc., a Florida corporation, having a business address at 1291-B N.W. 65th Place, Ft. Lauderdale Florida 33309 ("ACC"), believes it will be damaged and hereby opposes the registration of said trademark. The grounds for opposition are as follows:

1. Applicant, N.V. Sumatra Tobacco Trading Company ("Sumatra"), seeks to register U UNION and Design as a trademark for use with respect to "Cigarettes, Kretek Cigarettes, White Cigarettes, Cigarette Filters, Cigars, Raw Tobacco, Virginia Tobacco, Cigarette Tobacco, Snuff Tobacco, Chewing Tobacco, Cut of Cloves for Smoking, Cornhusk Tobacco and Smokers' Articles, namely, Cigarette Pipes, Cigarette Papers, Tobacco Pouches, Pipes, Ashtrays not of Precious Metal, Matches Cigarette Lighters not of Precious Metal, Cigarette Cases and Holders not of Precious Metal and Match Boxes and Holders not of Precious Metal" in Class 34.

2. Sumatra filed for the U.S. trademark on June 7, 2002, claiming priority from and relying upon a foreign trademark application filed May 16, 2002, which matured into a registration in Indonesia, Reg. No. 536434, on April 21, 2003.

3. Opposer, ACC is the owner/assignee of the trademark UNION, reg. No. 2,972,594, for “cigarettes” in Class 34.

4. Maryjane Cigarette Company, Inc. (herein “Maryjane”) filed a trademark application for the mark, UNION, Serial No. 78/066,805, on June 1, 2001. The application matured into Reg. No. 2,972,594 on July 19, 2005.

5. Maryjane assigned the UNION trademark to ACC on May 15, 2007, and the assignment was recorded in the PTO at reel/frame 3542/0087. All goodwill and trademark rights associated with UNION were transferred to ACC by the recorded assignment.

6. ACC’s rights to exclusively use the registered mark UNION on cigarettes relates back to the filing date of the UNION trademark application, namely June 1, 2001. (See 15 USC 1057(c)).

7. By virtue of use in commerce of the mark UNION by ACC and its predecessor in the United States, the relevant trade and public have come to associate goods bearing the UNION Mark with ACC.

8. ACC’s rights under the Lanham Act, based upon the filing date of its UNION trademark application (June 1, 2001), in connection with goods and services listed therein, predates Sumatra’s effective filing date (May 16, 2002) due to its priority foreign filing date.

9. The proposed goods of Sumatra and the goods of ACC are identical and/or substantially similar and related.

10. Sumatra's U UNION and Design Mark, as applied to the goods set forth in the application herein opposed, so resembles ACC's UNION Mark as applied to its goods that it is likely to cause confusion, mistake and/or deception, in the relevant trade and with consumers.

11. If Sumatra is permitted to register the U UNION and Design Mark for the goods set forth in the application, confusion of the trade and public is likely to result, such confusion resulting in damage and injury to ACC.

12. Purchasers and potential purchasers, on seeing Sumatra's U UNION and Design Mark used in connection with its goods are likely to believe, in error, that such goods are offered in association or affiliation with or under license from ACC.

13. If Sumatra is permitted to register its mark for the goods set forth in the application herein opposed, confusion of the relevant trade and public resulting in damage and injury to ACC would be likely to result. Any persons familiar with the goods of ACC would be likely to assume that Sumatra's goods are sponsored by or produced under license from or otherwise affiliated with ACC. Furthermore, any objection to or fault found with Sumatra's goods provided under its mark would necessarily reflect on and seriously injure the reputation that ACC has established for its goods sold and services offered under its UNION Mark.

14. If Sumatra were granted a registration for the mark herein opposed, it would obtain thereby at least a prima facie exclusive right to use the mark. Such registration would be a source of damage and injury to ACC.

WHEREFORE, ACC requests that registration of the mark of application No. 76/415,305 be refused and that this opposition be sustained.

Please charge Deposit Account No. 03-1231 for the filing fee of \$300.00 and any additional fees or deficiencies deemed to be due and owing in connection with this opposition may be charged to Deposit Account No. 03-1231 and any overpayment may be credited thereto.

Dated: October 7, 2008

Respectfully submitted,

Fort Lauderdale, Florida

By: /Robert Kain/

Robert C. Kain, Jr. (266760)

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Fort Lauderdale, Florida 33316

Telephone: (954) 768-9002

Facsimile: (954) 768-0158

Attorney for Opposer American Cigarette Company, Inc.

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Trademark Trial and Appeal Board Electronic Filing System. <http://estta.uspto.gov>ESTTA Tracking number: **ESTTA224761**Filing date: **07/17/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	American Cigarette Company, Inc.		
Entity	corporation	Citizenship	Florida
Address	1291-B NORTHWEST 65TH PLACE Fort Lauderdale, FL 33309 UNITED STATES		

Correspondence information	Robert C. Kain, Jr. Kain & Associates, Attorneys at Law, P.A. 750 Southeast Third Avenue Fort Lauderdale, FL 33316 UNITED STATES ekotler@complexip.com, rkain@complexip.com
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Applicant Information

Application No	76415303	Publication date	07/15/2008
Opposition Filing Date	07/17/2008	Opposition Period Ends	08/14/2008
International Registration No.	NONE	International Registration Date	NONE
Applicant	N.V. SUMATRA TOBACCO TRADING COMPANY Jalan Pattimura No. 3 Pematang Siantar Sumatera Utara, INDONESIA		

Goods/Services Affected by Opposition

Class 034. All goods and services in the class are opposed, namely: CIGARETTES, KRETEK CIGARETTES, CIGARS, VIRGINIA TOBACCO, SHAG TOBACCO, CUT OF CLOVES FOR SMOKING, CIGARETTE PAPERS, CIGARETTE LIGHTERS NOT OF PRECIOUS METAL AND MATCHES

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	2972594	Application Date	06/01/2001
Registration Date	07/19/2005	Foreign Priority Date	NONE
Word Mark	UNION		
Design Mark			

Description of Mark	NONE
Goods/Services	Class 034. First use: First Use: 2004/02/04 First Use In Commerce: 2004/02/04 cigarettes

Attachments	plead-Not-Opposition-071708.pdf (4 pages)(15183 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/rck/
Name	Robert C. Kain, Jr.
Date	07/17/2008

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of trademark application Serial No. 76/415,303
Published for opposition in the Official Gazette of July 15, 2008
Mark: UNION GOLD

-----)	
AMERICAN CIGARETTE)	
COMPANY INC.,)	
Opposer,)	
)	
v.)	Opposition No. _____
)	
N.V. SUMATRA TOBACCO)	
TRADING COMPANY)	
Applicant.)	
-----)	

NOTICE OF OPPOSITION

American Cigarette Company, Inc., a Florida corporation, having a business address at 1291-B N.W. 65th Place, Ft. Lauderdale Florida 33309 ("ACC"), believes it will be damaged and hereby opposes the registration of said trademark. The grounds for opposition are as follows:

1. Applicant, N.V. Sumatra Tobacco Trading Company ("Sumatra"), seeks to register UNION GOLD as a trademark for use with respect to "Cigarettes, Kretek Cigarettes, Cigars, Virginia Tobacco, Shag Tobacco, Cut of Cloves for Smoking, Cigarette Papers, Cigarette lighters not of precious metal and matches" in Class 34.
2. Sumatra filed for the U.S. trademark on June 7, 2002, relying upon an foreign registration in Indonesia, Reg. No. 320784, dated December 29, 1994.
3. Opposer, ACC is the owner/assignee of the trademark UNION, reg. No. 2,972,594, for "cigarettes" in Class 34.

4. Maryjane Cigarette Company, Inc.(herein “Maryjane”) filed the mark, UNION, Serial No. 78/066,805, on June 1, 2001.

5. Maryjane assigned the UNION trademark to ACC on May 15, 2007, and the assignment was recorded in the PTO at reel/frame 3542/0087. All goodwill and trademark rights associated with UNION were transferred to ACC by the recorded assignment.

6. ACC’s rights to exclusively use the registered mark UNION on cigarettes relates back to the filing date of the Union trademark application, namely June 1, 2001. (See 15 USC 1057(c)).

7.By virtue of use in commerce of the mark UNION by ACC and its predecessor in the United States, the relevant trade and public have come to associate goods bearing the UNION Mark with ACC.

8. ACC's rights under the Lanham Act, based upon the filing date of its UNION trademark application (June 1, 2001), in connection with goods and services listed therein, predates Sumatra's effective filing date (June 7, 2002).

9. The proposed goods of Sumatra and the goods of ACC are identical and/or substantially similar and related.

10. Sumatra’s UNION GOLD Mark, as applied to the goods set forth in the application herein opposed, so resembles ACC's UNION Mark as applied to its goods that it is likely to cause confusion, mistake and/or deception, in the relevant trade and with consumers.

11. If Sumatra is permitted to register the UNION GOLD Mark for the goods set forth in the application, confusion of the trade and public is likely to result, such confusion

resulting in damage and injury to ACC.

12. Purchasers and potential purchasers, on seeing Sumatra's UNION GOLD Mark used in connection with its goods are likely to believe, in error, that such goods are offered in association or affiliation with or under license from ACC.

13. If Sumatra is permitted to register its mark for the goods set forth in the application herein opposed, confusion of the relevant trade and public resulting in damage and injury to ACC would be likely to result. Any persons familiar with the goods of ACC would be likely to assume that Sumatra's goods are sponsored by or produced under license from or otherwise affiliated with ACC. Furthermore, any objection to or fault found with Sumatra's goods provided under its mark would necessarily reflect on and seriously injure the reputation that ACC has established for its goods sold and services offered under its UNION Mark.

14. If Sumatra were granted a registration for the mark herein opposed, it would obtain thereby at least a prima facie exclusive right to use the mark. Such registration would be a source of damage and injury to ACC.

WHEREFORE, ACC requests that registration of the mark of application No. 76/415,303 be refused and that this opposition be sustained.

Please charge Deposit Account No. 03-1231 for the filing fee of \$300.00 and any additional fees or deficiencies deemed to be due and owing in connection with this opposition may be charged to Deposit Account No. 03-1231 and any overpayment may be credited thereto.

Dated: July 17, 2008

Respectfully submitted,

Fort Lauderdale, Florida

By: /Robert Kain/

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Attorney for Opposer American Cigarette Company, Inc.

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